

MOTION FILED
MAY 6 - 1985

85-608

No. 608

4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

v.

ALBERT KRULL, GEORGE LUCAS and
SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

MOTION TO JOIN BRIEF AND
BRIEF AMICI CURIAE OF THE
STATE OF ARIZONA, AND
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC.,
AND
THE ILLINOIS ASSOCIATION OF
CHIEFS OF POLICE, INC.,
IN SUPPORT OF THE PETITIONER

(List of Counsel on Inside Front Cover)

15 P18

OF COUNSEL:

HON. ROBERT K. CORBIN, ESQ.

Attorney General

STEVEN J. TWIST, ESQ.

Chief Assistant Attorney General
State of Arizona
1275 W. Washington Street
Phoenix, Arizona 85007

DANIEL B. HALES, ESQ.

Peterson, Ross, Schloerb
and Seidel

President,

Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

JAMES A. MURPHY

Chairman, Law Committee
Illinois Association of
Chiefs of Police, Inc.
542 S.W. Adams Street
Peoria, Illinois 61602

WILLIAM C. SUMMERS, ESQ.

Supervising Attorney,
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland 20878

JACK E. YELVERTON, ESQ.

Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.

John Henry Wigmore Professor
of Law, Emeritus,
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.

Executive Director,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.

General Counsel,
Americans for Effective
Law Enforcement, Inc.
Executive Editor,
National District Attorneys
Association, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF STATE AMICUS CURIAE	1
MOTION FOR LEAVE OF NON-STATE AMICI CURIAE TO FILE BRIEF	1
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
ARGUMENT.....	3
A SEARCH THAT IS CONDUCTED PURSUANT TO A STATUTORY SCHEME LATER HELD UNCONSTITUTIONAL IS NEVERTHELESS VALID IF IT IS UNDER- TAKEN IN GOOD FAITH RELIANCE ON THAT STATUTE PRIOR TO THE TIME THAT ANY COURT HAS DECLARED THE STATUTE UNCONSTITUTIONAL; SUCH RULING IS NECESSARY TO GIVE EFFECT TO THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE ADOPTED BY THIS COURT, AND AS CODIFIED BY THE STATES.....	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Massachusetts v. Sheppard</i> , 468 U.S. —, 104 S.Ct. 3424 (1984).....	<i>passim</i>
<i>Michigan v. DeFillippo</i> , 443 U.S. 31, 99 S.Ct. 2627 (1979).....	3, 4
<i>Michigan v. Tucker</i> , 417 U.S. 433, 94 S.Ct. 2357 (1974).....	4
<i>People v. Barnes</i> , — Mich. App. —, 379 N.W.2d 464 (1986)	5
<i>People v. Deitchman</i> , 695 P.2d 1146 (Colo. 1985) ..	6
<i>People v. Krull</i> , 107 Ill. 2d 107, 481 N.E.2d 703 (1985).....	3
<i>United States v. Leon</i> , 468 U.S. —, 104 S.Ct. 3405 (1984).....	<i>passim</i>
<i>United States v. Peltier</i> , 422 U.S. 531, 95 S.Ct. 2313 (1975).....	6

Statutes and Bills

Ariz. Rev. Stat. § 13-3925	6
Colo. Rev. Stat. § 16-3-308	6
Ill. H.B. 3077 (1986)	7
S. 2231, 97th Cong. 2d Sess. (1982)	7
S. 2903, 97th Cong. 2d Sess. (1982)	7

Reports and Books

AELE Model State Statute on Exclusionary Rule Limitation (1985)	7
Inbau, Thompson, Zagel and Manak, Criminal Law and Its Administration (1984)	4
LaFave, Search and Seizure (1978)	4
The Exclusionary Rule Bills: Hearings Before the Sub-committee on Criminal Law of the Senate Committee on the Judiciary, 97th Congress, 1st and 2nd Sess. (1982)	7
1981 Attorney General's Task Force on Violent Crime, Final Report	6

No. 608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

v.

ALBERT KRULL, GEORGE LUCAS and
SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

MOTION

**TO JOIN BRIEF BY AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.**

JOINED BY

**THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,**

**THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC.,**

AND

**THE ILLINOIS ASSOCIATION OF
CHIEFS OF POLICE, INC.,**

IN SUPPORT OF THE PETITIONER

STATEMENT OF THE STATE OF ARIZONA

The State of Arizona appears as *amicus curiae* pursuant to Rule 36, Par. 4, which brief is sponsored by the Hon. Robert K. Corbin, Attorney General for the State of Arizona.

No. 608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

v.

ALBERT KRULL, GEORGE LUCAS and
SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

MOTION

**TO JOIN BRIEF BY AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.**

JOINED BY

**THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC.,**

AND

**THE ILLINOIS ASSOCIATION OF
CHIEFS OF POLICE, INC.,
IN SUPPORT OF THE PETITIONER**

**MOTION FOR LEAVE OF NON-STATE
AMICI CURIAE TO FILE BRIEF**

Come now Americans for Effective Law Enforcement, Inc., *et al.*, and move this Court for leave to file and join the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The non-state *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-one times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Illinois Association of Chiefs of Police, Inc. (IACP-IL), is a not-for-profit Illinois association and consists of over 800 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special

emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, as well as carrying out the regulatory statutes of various states, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, and NDAA are national associations, and their perspective is nationwide. IACP-IL represents law enforcement officers and law enforcement administrators in the State of Illinois who are directly effected by the decision of the court below. This brief concentrates on policy issues, including the values served by the State's ability to adopt statutes giving effect to the good faith exception to the exclusionary rule, especially as such statutes pertain to arrests and searches based upon statutes that are constitutional on their face. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents several issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of all parties. The Consent of Petitioner has been received, and the consent has been filed with the clerk of this Court. This Motion is necessary because counsel for Respondents have declined to grant consent to the *amici*.

For these reasons, the non-State *amici curiae* request that they be granted leave to file and join in the attached *amici curiae* brief.

Respectfully submitted,

JAMES P. MANAK, ESQ.
 33 North LaSalle Street
 Suite 2108
 Chicago, Illinois 60602
 Telephone: (312) 236-3927
*Counsel for Movant Parties,
 Non-State Amici Curiae*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

v.

ALBERT KRULL, GEORGE LUCAS and
 SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
 SUPREME COURT OF ILLINOIS

BRIEF AMICI CURIAE OF THE
 STATE OF ARIZONA AND AMERICANS FOR
 EFFECTIVE LAW ENFORCEMENT, INC.

JOINED BY

THE INTERNATIONAL ASSOCIATION OF
 CHIEFS OF POLICE, INC.,
 THE NATIONAL DISTRICT ATTORNEYS
 ASSOCIATION, INC.,

AND

THE ILLINOIS ASSOCIATION OF
 CHIEFS OF POLICE, INC.,
 IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

THE ATTORNEY GENERAL OF THE STATE OF
 ARIZONA is the chief law enforcement officer of his state.

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-one times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Illinois Association of Chiefs of Police, Inc. (IACP-IL), is a not-for-profit Illinois association and consists of over 800 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to present in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

ARGUMENT

A SEARCH THAT IS CONDUCTED PURSUANT TO A STATUTORY SCHEME LATER HELD UNCONSTITUTIONAL IS NEVERTHELESS VALID IF IT IS UNDERTAKEN IN GOOD FAITH RELIANCE ON THAT STATUTE PRIOR TO THE TIME THAT ANY COURT HAS DECLARED THE STATUTE UNCONSTITUTIONAL; SUCH RULING IS NECESSARY TO GIVE EFFECT TO THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE ADOPTED BY THIS COURT, AND AS CODIFIED BY THE STATES.

The Court below, *People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985), ruled, *inter alia*, that: (1) a state statute which, prior to its amendment by other statutes, authorized warrantless administrative searches of records and business premises of automotive parts dealers, scrap processors, and parts recyclers "at any reasonable time during the night or day" was unconstitutional, and (2) a search made in good faith reliance on the unconstitutional statute which at the time of the search had not yet been declared unconstitutional was not valid.

Amici curiae will not duplicate the case law analysis presented by the Petitioner State of Illinois in this case, although we agree with that analysis. Instead, we will concentrate upon issues of policy.

We note, however, that the issues involved in this case could readily have been resolved by the court below by a straightforward application of this Court's decision in *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627 (1979). In that case this Court ruled that evidence seized by the police incident to an arrest pursuant to an ordinance subsequently declared to be unconstitutional was nevertheless admissible because of the good faith reliance of the officer upon the presumptively valid ordinance. In the instant case, the Illinois law enforcement officers acted pursuant to a statute that, at the time of the

search, was valid on its face and had not been declared unconstitutional. The attempt of the court below, 481 N.E.2d at 708, to distinguish between substantive laws, as opposed to procedural laws, for application of the rule in *DeFillippo* is unwarranted in light of the *rationale* for the rule in *DeFillippo*, i.e., that suppression of evidence obtained by a law enforcement officer pursuant to a law valid on its face would serve no *deterrent purpose*. As the Court had previously stated in *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357 (1974), "[W]here the official action was pursued in complete good faith . . . the deterrence rationale [of the exclusionary rule] loses much of its force." 417 U.S. at 447, 94 S.Ct. at 2365.

Viewed from the basis of the primary purpose of the exclusionary rule—deterrence—and the rationale applied by this Court in *DeFillippo* and *Tucker*, the distinction made by the Illinois court is fundamentally flawed.

This conclusion is especially true in light of this Court's subsequent decision in *United States v. Leon*, 468 U.S. —, 104 S.Ct. 3405 (1984); and, in fact, adoption of the distinction made by the Illinois court in the instant case would be a substantial *regression* from *Leon*. In that case this Court adopted the rule that the exclusionary rule should not be applied when a police officer conducting a search has acted in a good-faith, objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that is subsequently determined to be invalid. The underlying basis for the Court's rule, as noted by various commentators subsequent to *Leon*, e.g., LaFave, 1 Search and Seizure (1978), 1986 Pocket Part 1; Inbau, Thompson, Zagel and Manak, Criminal Law and Its Administration (1984), 1986 Supplement 169-170, was that suppression of evidence where the officer has acted in objective good faith would not serve the *primary purpose* of the exclusionary rule—*deterrence*.

Amici submit that the same rationale should apply in this case. Although the search was without a warrant, it was pursuant to the authority of a state statute valid on its face. The statute placed affirmative duties upon the law enforcement officers to conduct an inspection of a state-regulated industry. No deterrent value could possibly result from suppression of the evidence in this case; and, in fact, if the officers in *Krull* were required to make an arrest or search at any time in the future pursuant to an Illinois statute valid on its face and not then declared unconstitutional by a court of competent jurisdiction, we would, as law enforcement administrators, *expect* them to do so and might question their *failure to do so*. Their failure to do so could well be a dereliction of duty; a subsequent judicial determination that the statute was unconstitutional—whether it were a substantive or procedural statute—would have *no* deterrent effect upon the officers' conduct and *should not* have a deterrent effect upon the duty of the officers to enforce the law.

The lack of deterrent effect is even stronger in the case of a statute pertaining to a "pervasively regulated industry" such as that involved in the instant case—auto salvage yards that are potential *loci* of criminal activity—where the state interest in inspection of books, records and facilities is strong. See *People v. Barnes*, — Mich. App. —, 379 N.W.2d 464 (1986) (a state statute requiring individuals in the "pervasively regulated industry" of automobile salvage yards to keep records and inventory open to police inspection without a warrant during business hours did not violate the Fourth Amendment).

Amici would go further and assure this Court that as law enforcement administrators and professional associations representing law enforcement administrators, it would be our responsibility—as expressed in carrying out training, supervisory, and disciplinary functions where applicable—that police officers are to follow the requirements of state statutes valid on their face, and that their failure to do so could, in appropriate cases, be a basis for disciplinary action. Under these circum-

stances—which is simply a reiteration of the traditional supervisory role and function of law enforcement administration—it would be highly unlikely that a subsequent judicial invalidation of a statute or ordinance could *ever* have a deterrent effect upon police behavior.

There is yet another reason why this Court should reject the rationale applied by the court below and reverse this case. This Court's decision in *Leon*, and the companion case of *Massachusetts v. Sheppard*, 468 U.S. —, 104 S.Ct. 3424 (1984), was the culmination of the realization by this Court as expressed in earlier cases such as *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313 (1975), that the *underlying rationale* of the exclusionary rule (as a rule of evidence not constitutionally mandated) is *deterrence* of police violations of Fourth Amendment rights. Without specific or general deterrent value in a particular judicial application of the rule, the rule serves no purpose save to punish the police and provide the defendant with a windfall.

This underlying rationale for the rule has also been recognized by various policy-making bodies. The 1981 Attorney General's Task Force on Violent Crime recommended in its Final Report, 55: "... evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment." State legislation enacted prior to *Leon-Sheppard* by the States of Arizona and Colorado provided that evidence was not to be suppressed if it "was seized by a peace officer as a result of a good faith mistake or technical violation," the latter including "a reasonable good faith reliance upon ... [a] statute which is subsequently ruled unconstitutional." Ariz. Rev. Stat. § 13-3925; Colo. Rev. Stat. § 16-3-308 to the same effect (in *People v. Deitchman*, 695 P.2d 1146 (1985) four members of the Supreme Court of Colorado reached the conclusion that the good faith exception of the Colorado statute did not apply to the case). National profes-

sional organizations of law enforcement officers and administrators have made similar recommendations, e.g., AELE Model State Statute on Exclusionary Rule Limitation (1985). Moreover, similar legislation has been introduced at the federal level, e.g., S. 2231, 97th Cong., 2d Sess. (1982); Exclusionary Rule Application Act of 1982, proposed in Title II of S. 2903, 97th Cong., 2d Sess. (1982); The Exclusionary Rule Bills: Hearings Before the Sub-comm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1982). And similar legislation is pending in various state legislatures, including Illinois (Ill. H.B. 3077: "... 'Good Faith' means whenever a peace officer obtains evidence; ... pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated.")

These various enactments, bills, proposals and recommendations, are founded on the proposition approved by this Court in *Leon-Sheppard*, i.e., that *deterrence* is the underlying rationale for application of the exclusionary rule; and several of them recognize that good faith should, in part, be based upon police conduct taken pursuant to a statute or ordinance later declared unconstitutional by a court.

Affirmance of the decision of the court below would not only have the effect of regressing from the underlying rationale of *Leon-Sheppard* but would, in effect, negate the legislative judgment of Arizona and Colorado that good faith should be based in part upon a police officer's reliance upon a statute or ordinance valid on its face. Such a decision would also have the effect of retarding the process at state and federal levels of codifying the good faith exception to the exclusionary rule, *which process is desirable for the guidance of police, prosecutors, and courts.*

Amici respectfully submit that reversal of the decision below is the only action that this Court can take consistent with the rule of *Leon-Sheppard*; reversal will additionally speed the process of codification of the good faith exception, providing law enforcement officials and courts with clear and precise guidance for cases where continued application of the exclusionary rule is deemed appropriate.

CONCLUSION

Amici respectfully request this Court to affirm the rationale of its decisions in *Leon-Sheppard* by declaring that the fruits of a search conducted by a police officer pursuant to a statute later declared unconstitutional are admissible in a criminal prosecution. We urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

Respectfully submitted,

OF COUNSEL:

HON. ROBERT K. CORBIN, ESQ.

Attorney General

STEVEN J. TWIST, ESQ.

Chief Assistant Attorney General
State of Arizona
1275 W. Washington Street
Phoenix, Arizona 85007

DANIEL B. HALES, ESQ.

Peterson, Ross, Schloerb
and Seidel

President,

Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

JAMES A. MURPHY

Chairman, Law Committee
Illinois Association of
Chiefs of Police, Inc.
542 S.W. Adams Street
Peoria, Illinois 61602

WILLIAM C. SUMMERS, ESQ.

Supervising Attorney,
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland 20878

JACK E. YELVERTON, ESQ.

Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.

John Henry Wigmore Professor
of Law, Emeritus,
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.

Executive Director,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.

General Counsel,
Americans for Effective
Law Enforcement, Inc.
Executive Editor,
National District Attorneys
Association, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae